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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 953

INDUSTRIAL WORKERS OF THE WORLD, ET AL.,
Petitioners,

v.

RAMSEY CLARK,
ATTORNEY GENERAL OF THE UNITED STATES,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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INDEX

	PAGE
Opinion below	2
The record	2
Jurisdiction	2
Questions presented	2
Executive Orders, Regulations and Informal Review adopted by Attorney General, and Constitutional Provisions Involved	3
Statement	4
Reasons for granting the writ	8
Conclusion	11

CITATIONS

DuBois Clubs of America v. Clark, ...U.S.....(36 U.S. Law Week 3238, 3239, 12/11/67)	9
Hannah v. Larche, 363 U.S. 420, 491 (1959)	8, 10
Honda v. Clark, 18 L.Ed 2d 244, 254 (1967)	9
In Re Thompson's Petition, 209 F. Supp. 494, 498 (D.C.N.D. Ill., 1962)	6
Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 140–141 (1950)	8, 10
Lane v. Wilson, 307 U.S. 268, 275–276 (1939)	9
National Lawyers Guild v. Brownell, 96 U.S. App. D.C. 252, 225 F.2d 552, 555 (1955)	10
Pfister v. Dombrowski, 380 U.S. 479, 495–496 (1965)	8
Rudder v. United States, 96 App. D.C. 329, 226 F.2d 51 (1955)	8
Thompson v. Immigration and Naturalization Service, 375 U.S. 384 (1964)	9
Thompson v. Immigration and Naturalization Service, 332 F.2d 167 (7 Cir., 1964)	6
United States v. Robel, ... U.S. .... (36 U.S. Law Week, 4060, 4061, 4064, 12/11/67)	10
Weiman v. Updegraff, 344 U.S. 183 (1952)	10

AUTHORITIES

Emerson, Haber & Dorsen, Political and Civil Rights in the United States, 3rd Ed., 1967, pp. 228, 284, 293, 308	8

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v.

RAMSEY CLARK,
ATTORNEY GENERAL OF THE UNITED STATES,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Petitioner[1] prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia entered in the above case on September 26, 1967.

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[1]Plaintiffs below were petitioner, an unincorporated labor union, its officers, and members, referred to in this petition for convenience as petitioner.

OPINION BELOW

The judgment order of the district court denying petitioner's motion for summary judgment and granting respondent's cross motion to dismiss the complaint was not reported. The district court's oral statement of the bases for the order is set out in the joint appendix (p. 31) with the judgment (p. 33). The opinion of the Court of Appeals for the District of Columbia issued on September 26, 1967, is not yet reported and is set out in full in an appendix to this petition.

THE RECORD

A certified copy of the record below has been filed in this Court along with nine copies of the Joint Appendix.

JURISDICTION

This petition is presented for review of the judgment of the Court of Appeals entered on September 26, 1967, and the jurisdiction of this Court is invoked, under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

Question Presented by the Petition for Certiorari

Whether: 1. an organization may challenge on constitutional grounds the validity of its designation on the Attorney General's List where the Attorney General did not adopt rules that provided for notice to the organization of its designation within the period provided for objection.

2. the organization can be charged with presumptive notice of the period for objecting to the designation because of a prior designation which was also made without notice to the organization, and where no notice of the new contest period appeared in the prior designation.

3. the Attorney General can refuse to consider petitioner's challenge to the validity of its designation on the grounds that

petitioner failed to object within the period for administrative review where the Attorney General subsequently established an informal administrative review procedure which petitioner has exhausted.

4. where the Attorney General adopts informal review both of the correctness of petitioner's original designation of petitioner and of whether the designation should be continued and the court below finds that the Attorney General was arbitrary in refusing petitioner such informal review, whether the court can order the Attorney General to review only petitioner's continued designation.

Questions to be Presented if Certiorari is Granted

1. Whether the delegation by the President to the Attorney General of the power to adopt rules, make the designations, and publish and maintain the Attorney General's List is overly broad, vague, lacks standard, and fails to give notice of the Attorney General's authority to individuals and organizations affected.

2. Whether the Rules adopted by the Attorney General and the effect of the designation and publication of the List violate:

(a) the freedom of speech and association provisions in the First Amendment, and

(b) the due process of law provision of the Fifth Amendment.

EXECUTIVE ORDERS, REGULATIONS AND INFORMAL REVIEW ADOPTED BY THE ATTORNEY GENERAL, AND CONSTITUTIONAL PROVISIONS INVOLVED.

The Executive Orders involved and the regulations and informal review adopted by the Attorney General are: E.O. 9835, 12 Fed. Reg. 1935, the regulations, 28 C.F.R. 41.1(a) et. seq.

(1949), the desi nation of the petitioner and others, 14 Fed. Reg. 2371, E.O. 10450, 18 Fed. Reg. 2489, the regulations, 28 C.F.R. 41.1(a), et. seq. (1953), and provision for redesignation at Sec. 41.11, the redesignation, 18 Fed. Reg. 2741, and the informal review, subsequently adopted Exhibit C (Joint App., pp. 29–30) Par. 8, stipulation of facts, (Joint App. p. 23), Exhibit B (Joint App. p. 10), Opinion (App. p. 4). The constitutional provisions involved are the due process clause of the Fifth Amendment and the freedom of speech and association provisions of the First Amendment. These all are set out in an appendix to this petition.

STATEMENT

The jurisdiction of the district court was invoked under 28 USCA 2281, 1346, and 2201, and 5 USCA 1009.

Petitioner is an unincorporated labor organization designated in 1949 by the Attorney General without notice as an organization "seeking to alter the form of government of the United States by unconstitutional means" and the designation included with a list of organizations under various other categories on the Attorney General's List, under procedure adopted by the Attorney General, 28 C.F.R. 41.1(a) following the President's Executive Order 9835. Under that procedure a designated organization had 10 days to object after the List was published in the Federal Register, without provision for actual notice, and whether or not the organization actually received notice of the designation within the 10 day period. The List was used as a means of determining eligibility of members of listed organizations for federal employment, housing, tax exemption, and other benefits.

In 1953 E.O. 9835 was revoked and E.O. 10450 issued. The Attorney General revised the provisions of 28 C.F.R. 41.1(a) *et. seq.* and provided for actual notice to new organizations to be designated, and for notice of contest within thirty days,

Section 41.1(b). However, organizations previously designated under E.O. 9835 were redesignated without such notice, Section 41.11, and their time for objection limited to ten days from the effective date of E.O. 10450 (Section 41.1(a)). The categories of organization under the first List were dropped, and the List was commonly known as The Subversive List. Petitioner did not file a notice of contest within that period. (The small number of organizations aware of the contest period who objected and whose designations were recalled continued to be carried on the List with a thin line through the name of the organization, without any explanation of the meaning of the line.)

Subsequently, on or about October 6, 1949, petitioner requested review of the designation. The Attorney General replied that he re-examined the designation and denied relief. No hearing was held. Subsequently petitioner continued to request review of the designation and each time the Attorney General replied that he would consider new evidence of why the original designation was incorrect. No reasons for that designation ever were presented to petitioner and each request was denied. The Attorney General later stated to the court in its pleadings in this case that "the concept of administrative review" had been "informally added" to the regulations.

The last invitation for such review occurred in a letter from the Attorney General to petitioner on January 6, 1965 (Ex. C., Joint App. pp. 29–30):

* * *

> Regarding the desire of the membership that this Department take steps to cause the organization to be removed from the list, I should like to observe that some eleven years have now elapsed since the designation under Executive Order No. 10450 became legally effective. It seems extremely improbable that an organization could be properly delisted upon review by the Acting Attorney General if his review were limited to a mere reconsidera-

> tion of the information considered by Attorneys General Clark, McGrath, and Brownell at the time of their respective decisions to designate the organization. Unless some new information is adduced that tends to cast doubt upon the propriety of the original decision to designate, there would appear to be little purpose in reviewing the separate, but unanimous findings of three former Attorneys General.
>
> With specific reference to what steps the membership itself, or their representatives, may take in this matter, as we have stated in the past in answer to similar inquiries on behalf of the Industrial Workers of the World, a petition of the organization requesting delisting will be given careful study and consideration if it presents new information providing a reasonable basis for considering such delisting.

Petitioner replied and enclosed a copy of the opinion in *Thompson v. Immigration and Naturalization Service*, 332 F.2d 167, (7 Cir., 1964). The entire history of the character of the I.W.W. was put into issue by the government in the lower court in that case, *In Re Petition of Thompson*, 209 F.Supp. 494 (D.C.N.D.Ill. 1962) where the organization was found to be "an organization seeking to change the form of government by unconstitutional means." at 498, Fdg. Fact 1–11. This finding was held to be clearly erroneous in the *Thompson* case, and petitioner contended that this judicial determination was superior to the *ex parte* designation by the Attorney General. The Attorney General returned the request and stated (Ex. B.J.A. p. 10):

> [In the letter of January 6, 1964 w]e pointed out that unless some new information is adduced that tends to cast doubt upon the propriety of the original decision to designate, there would appear to be little purpose in reviewing the separate but unanimous findings of three Attorneys General.
>
> The information contained in the petition signed by Carl Keller which you forwarded with your letter does not warrant a review by this department.

This letter also stated that the *Thompson* case was no ground for review. Petitioner promptly filed suit.

In the suit petitioner alleged on constitutional grounds that the notice provisions were inadequate and that the Attorney General was estopped from asserting untimeliness when petitioner was participating in the (informal) administrative review process. Petitioner also questioned the validity of the delegation of power by the President to the Attorney General, and challenged the List on First Amendment grounds.

The case was heard on the pleadings, and on stipulated facts. The district court denied petitioner's motion for judgment on the pleadings, and granted the Attorney General's cross-motion for summary judgment. The ground given for the ruling was that petitioner had failed to file objections within the ten day period. On review the Court of Appeals determined ten days to be too "cabined and confined," but by computing from the effective date of E.O. 10450, found that redesignated organizations had 38 days to object. The Court decided that petitioner had presumptive notice of the redesignation and the period for objection because it had previously been designated under E.O. 9835. The Court came to this conclusion even though the effective date of E.O. 10450 was not contained in the regulations under E.O. 9835. The Court stated that it could not "say it was an abuse of discretion for the District Court to refuse to consider the I.W.W.'s challenges to its 1953 listing." (Opn. App. p. 10) And although the informal review offered by the Attorney General went to the validity of the original designation, based on a determination that the Attorney General had been arbitrary in failing to provide regulations for removal from the list on a change in circumstances, the Court then ordered the proceedings for de-listing of petitioner, in effect conceding for petitioner that the original designation was correct (and that the characterization of the organization and its members as "subversives" was correct, Opn. App. p. 11). Petitioner asks for review of this decision.

REASONS FOR GRANTING THE WRIT

1. Important constitutional questions involved, and conflict with decisions of this Court

(a) The decision below holds that petitioner is barred from challenging the original designation, which affects members of designated organizations adversely in federal employment, housing, and tax exemption, and which characterizes them as members of subversive groups,[2] for failure to object within the time provided by the Attorney General. However, the decision rests on the procedure in 28 C.F.R. 41.1(a) adopted by the Attorney General under E.O. 9835 that was condemned by this Court in *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 140–141 (1950).

The organizations, including petitioner, designated under E.O. 9835 were redesignated under E.O. 10450 without notice or hearing (although notice provisions were adopted in the C.F.R. for new organizations to be designated). The Court below relied on the original designation as a means of deciding that petitioner had presumptive notice of the redesignation, and thereby could have objected within the time period (Opn. App. 1–3). But as the original designation was without notice, and as the period for contest of the new listing was nowhere contained in the old listing, and therefore constitutionally inadequate,[3] no presumptive notice could be based on that

[2]Emerson, Haber & Dorsen, Political and Civil Rights in the United States, 3rd Ed., 1967, pp. 228, 284, 293, 308 and See Pfister v. Dombrowski 380 U.S. 479, 495–496 (1965).

[3]"the procedure which was found constitutionally wanting in [the Joint Anti-Fascist] case could be fairly characterized as 'action' 'to maim or decapitate' [an organization] on the mere say-so of the Attorney General . . ." concurring opinion of Justice Frankfurter, Hannah v. Larche, 363 U.S. 420, 491 (1959).

"The Attorney General gave the organizations and their members no hearing before he designated the organizations under E.O. 9835." Rudder v. United States, 96 App. D.C., 329, 226 F.2d 51, at 51 (1955).

invalid designation, *Lane v. Wilson*, 307 U.S. 268, 275–276 (1939).

(b) The decision below denies without due process of law a judicial determination of constitutional rights, on the one hand holding an organization barred from suit for untimeliness for exhausting administrative remedies, as required by *DuBois Clubs of America v. Clark*, ... U.S. ... (36 U.S. Law Week 3238, 3238–3239, 12/11/67), and on the other upholds the procedure of the Attorney General which permits an organization to be barred from review without notice, contrary to *United States v. Robel*, ... U.S. ..., (36 U.S. Law Week 4060, 4060–4061, 12/11/67).

The court below held that the Attorney General was arbitrary and capricious (Opn. App. 12) in refusing review for the purpose of delisting. But the decision also holds that the "concept of administrative review" added informally to the regulations by the Attorney General is limited to removal from the List on a showing by the organization of a change in circumstances. This decision requires a concession by the organization that the original designation was correct. It is also contrary to the review offered by the Attorney General when he invited new information that could be "adduced to cast doubt upon the original decision to designate." (Ex. C., J.A. 29 at p. 30 and Ex. B, J.A. p. 10).

(c) The Attorney General invited petitioner to submit evidence to review the original designation. The court below held that the trial court had discretion as to whether or not to hear petitioner's case. However, the Attorney General should be barred by estoppel from asserting untimeliness, *Honda v. Clark*, 18 L.Ed. 244, 254 (1967). To invite an organization to exhaust administrative review and later claim that the time ran for suit is arbitrary, *Thompson v. Immigration and Naturalization Service*, 375 U.S. 384 (1964). The administrative procedure condoned, and the holding that there was judicial discretion,

both are departures from the accepted and usual course of judicial proceedings and so far sanctioned such a course in the lower court as to call for an exercise of this Court's power of supervision.

(d) The delegation of power from President to the Attorney General was without standards, was overly broad, and vague, and the Attorney General has assumed power to proceed under regulations and practices *ex parte, National Lawyers Guild v. Brounoll*, 96 U.S. App. D.C. 252, 225 F. 2d 552, 555 (1955).[4] These adversely affect many individuals in their right to federal employment and to other benefits[5] under a loyalty-security program which inhibits freedom of speech and association, *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1950), supra, concurring opinion of Justice Black, p. 142, and which has defamed individuals and organizations, Justice Burton, p. 139, and condemned as guilt by association, *Weiman v. Updegraff*, 344 U.S. 183 (1952), in violation of due process of law of the organization and its members, and affords less than the proceeding under the Subversive Activities Control Board, 50 U.S.C. 781, et. seq., 28 C.F.R. 201.9 concurring opinion of Justice Brennan, *United States v. Robel*, ... U.S. ... (36 U.S. Law Week 4060, 4063–4067, 12/11/67).

[4]See, in contrast, Appendix to the opinion in Hannah v. Larche, 363 U.S. 420 (1959), *supra*, at pp. 454–485, listing the hearing procedures, before the various federal agencies and setting out the right to notice, hearing, and cross-examination.

[5]See Note 2, *supra*. In the standard federal employment form, this question appears:

"Q. 27. Are you now or have you ever been a member of any foreign or domestic organization, association, movement, group, or combination of persons which is totalitarian, Fascist, Communist, or subversive, or which has adopted or shows, a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or which seeks to alter the form of government of the United States by unconstitutional means?"

Presumably, a designation under E.O. 10450 would require an affirmative answer.

Conclusion

For the reasons set out above petitioner asks this Court to grant review and to reverse the Court below.

Respectfully submitted,

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,586

INDUSTRIAL WORKERS OF THE WORLD, ETC., ET AL.,
APPELLANTS

v.

RAMSEY CLARK,
ATTORNEY GENERAL OF THE UNITED STATES,
APPELLEE

Appeal from the United States District Court
for the District of Columbia

Decided September 26, 1967

Mr. Marshall Patner for appellants. *Mr. William Brackett* also entered an appearance for appellants.

Mr. Kevin T. Maroney, Attorney, Department of Justice, with whom *Assistant Attorney General Yeagley*, *Mr. George B. Searls* and *Mrs. Lee B. Anderson*, Attorneys, Department of Justice, were on the brief, for appellee.

Before DANAHER, LEVENTHAL and ROBINSON, *Circuit Judges*.

LEVENTHAL, *Circuit Judge:* This case presents problems arising out of the establishment and maintenance of the so-called "Attorney General's List." Relying on various federal statutes, President Truman in 1947 issued Executive

Order No. 9835, 12 Fed. Reg. 1935, establishing an Employees Loyalty Program in the Executive Branch of the Government. By this order the Attorney General was directed to furnish the Loyalty Review Board with the names of each foreign or domestic organization or association which he, after "appropriate investigation" designated as fascist, communist, totalitarian, or otherwise subversive. Thereupon the Board was instructed to disseminate this information to all federal departments and agencies. In 1949 the Attorney General cited the Industrial Workers of the World (IWW), appellant herein, as such an organization seeking to alter the form of government of the United States by unconstitutional means. *See* 14 Fed. Reg. 2371 (1949).

On April 27, 1953 President Eisenhower revoked Executive Order No. 9835, replacing it with Executive Order No. 10450, [18 Fed. Reg. 2489]. This new order somewhat refined notions of loyalty to make "security" the ultimate aim of the program. The new order continued the directive that the Attorney General compile and maintain a list of subversive organizations, but provided that he was to communicate this information directly to heads of departments and agencies. Pursuant to this directive, the Attorney General on April 29, 1953, 18 Fed. Reg. 2741, redesignated the organizations previously listed under the prior Executive Order, including the IWW. The Attorney General accompanied the redesignation with regulations setting forth procedures for prompt challenge to a proposed listing. Under the new regulation any organization whose listing was carried over from the previous determination was given ten days from the effective date of Executive Order No. 10450 (May 27, 1953) to file a written notice that it contested such listing. *See* 28 C.F.R. § 41.1(a) (1967). Failure to file such a notice of contest was declared to be "an acquiescence in such designation."[1]

[1]Membership in a listed organization is a factor used in weighing qualifications for federal employment, federally financed housing, and other federally created benefits. (JA 27) There is also a suggestion that because of the wide circulation of the list, it has had some impact on state and private employment and benefits. (JA 4)

The IWW made no such objection within that ten day period. Although the IWW kept up correspondence with the Attorney General intermittently over the years protesting its inclusion in the Attorney General's List, no court challenge to the organization's listing was made until the present action was instituted in 1965. The Attorney General then raised the defense of laches, contending that the exchange of letters over twelve years did not keep alive any objection to the 1953 listing. The District Court dismissed the action on the ground that the administrative remedies available with respect to the 1953 listing had not been exhausted.

We do not consider the merits of the IWW's claims that the procedures for listing allegedly subversive groups fatally offend the First and Fifth Amendments. Compare *Joint Anti-Fascist Refugees Comm. v. McGrath,* 341 U.S. 123 (1951), with *National Lawyers Guild v. Brownell,* 96 U.S. App.D.C. 252, 225 F.2d 552 (1955), *cert. denied* 351 U.S. 927 (1956), and *Association of Lithuanian Workers v. Brownell,* 101 U.S.App.D.C. 73, 247 F.2d 64, *vacated as moot,* 355 U.S. 23 (1957). We conclude that the failure to object within the allotted period to the 1953 listing precludes any judicial determination at this time that that listing was unlawful.

A 10-day period would be too "cabined and confined" to suffice as the exclusive opportunity for asserting a constitutional right available to a body of citizens whose circumstances do not encourage initiative and enterprise. *Lane v. Wilson,* 307 U.S. 268, 276 (1939). But it was reasonable for the Attorney General to assume that different considerations were properly applicable to persons already "organized" for expression of political views, if not more comprehensive purposes, and presumptively acquainted with rights and remedies.[2] In this context we note that since the IWW was a re-listed organization, it in fact had a period of 38

[2] *Cf.* Yakus v. United States, 321 U.S. 414 (1944).

days to file its objection,[3] and further note that although the IWW has objected to the procedures on the ground that they do not require actual notice of listing, there is no contention that the IWW was not in fact aware of the Attorney General's determination to continue listing it as a subversive organization in time to raise a contest.

That, however, is not the end of this case. Although the regulations issued on the heels of Executive Order 10450 provide in considerable detail for the mechanics of notice and hearing when a listed organization raises a timely challenge to the listing, within ten days of its effective date, *see* 28 C.F.R. §§ 41.1-.11 (1967), there is not a public suggestion, How, if ever, a listed organization may subsequently exonerate itself, if perchance it did not object within the ten day period. The stipulation of undisputed facts entered into between the parties recites:

> 8. Because neither the Executive Order nor the Rules issued thereunder provide a procedure for an organization's removal from the list of those designated, the defendant [Attorney General] has informally added to the above Rules the concept of administrative review upon a showing of a material change in the character of the organization or newly discovered material evidence. (JA 23)

The Attorney General assures us that "although the regulations do not provide a procedure for removing an organization from the list, defendant would, of course, afford further administrative proceedings to a designated organization upon a showing of a material change in the character of the organization or any substantial new and material evidence." (Brief for Appellee at 2.) The Attorney General correctly

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[3]Executive Order No. 10450 was promulgated on April 27, 1953, to become effective thirty days later on May 27, 1953. On the 29th of April, the Attorney General published in the Federal Register, 18 Fed. Reg. 2619, the rules of procedure for the federal employee security program. These rules announced that previously listed organizations could file contests to relisting within ten days after the (May 27) effective date of the Executive Order.

characterizes this technique of administrative review and reconsideration as "informal," since its origin and establishment appear only in correspondence with listed organizations. The decision as to what constitutes a "material change in the character of the organization" or "substantial and new material evidence" is apparently made ex parte by the Attorney General, and he has articulated no standards to guide his judgment on such questions.

We note that because of its failure to raise an objection to the 1953 listing within the period specified in the 1953 regulation, the IWW has never been advised what the substantive basis was for the determination to list it as a subversive organization. In such a context, a bare requirement that a listed organization demonstrate to the Attorney General's satisfaction that there is "new" material evidence or a material "change in the character" of the organization emerges as something less than a wholly satisfactory administrative remedy.

We need not pass at this point on whether the informal review the Attorney General assures us he makes available in this context is adequate.[4] The IWW does not raise that precise challenge. This is an area where First Amendment guarantees of freedom of speech, press, and political association are involved, however, and we consider this issue open in the further proceedings which we are ordering.

In any event, in this case we find that the IWW has resorted to what has thus far appeared as an administrative remedy, and despite the silence of the District Court on this aspect of the case, the IWW has, we think, timely raised a justiciable objection that the Attorney General's denial of relief was arbitrary.

We have referred to an irregular course of correspondence between the IWW and the Attorney General, dating at least from January 1954, in which the IWW continued to object

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[4] *Compare* Silver v. McNamara, 111 U.S.App.D.C. 334, 296 F.2d 591 (1961).

to its listing and the Attorney General consistently relied on the IWW's default in failing to protest within ten days of the listing in 1953. Of particular significance is the exchange of letters that began on December 23, 1964, when counsel for the IWW wrote to the Attorney General seeking information about the steps necessary to secure removal of the organization from the subversive list. On January 6, 1965, the Assistant Attorney General, Internal Security Division, responded that it seemed "extremely improbable that an organization could be properly delisted upon a review by the Acting Attorney General if his review were limited to a mere reconsideration of the information considered by Attorneys General [Tom C.] Clark, McGrath and Brownell at the time of their respective decisions to designate the organization." The letter proceeded to advise the IWW once more though that "'a petition of the organization requesting delisting will be given careful study and consideration if it presents new information providing a reasonable basis for considering such delisting." (JA 29-30)[5]

Then on February 13, 1965, the IWW submitted a letter styled "Petition" formally requesting delisting, or in the alternative seeking at least a hearing in support of the petition. The principal thrust of the petition, evidently designed to meet the Attorney General's precondition of "new material evidence" respecting the character of the organization was reliance on the May 21, 1964 decision of the Seventh Circuit in the case of *Thompson v. Immigration and Naturalization Service,* 332 F.2d 167, reversing *In re Thompson's Petition,* 209 F.Supp. 494 (N.D. Ill. 1962). There the District Court had rejected a naturalization petition on the ground that the petitioner was a member of the IWW, and that the IWW was an organization advocating the alteration of the American government by unconstitutional means.

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[5]This presumably was in the same vein as the Attorney General's informal assurance that "you may . . . submit for review any information you deem pertinent concerning the policies and objectives of your organization at this time." (Letter dated July 7, 1956, JA 23.)

The District Court sought to support its view with copious references to the literature of the IWW. The Seventh Circuit reversed this finding with the terse notation that it was "clearly erroneous" (332 F.2d at 170), relying on its rejection of a similar finding as to the Socialist Workers Party in *Scythes v. Webb*, 307 F.2d 905 (7th Cir. 1962).[6] Since the court also rejected a separate point argued in the alternative by the Government, it reversed the order denying naturalization.

As support for its request in the alternative for a hearing on the merits of the original listing, the IWW claimed that the January 6, 1965 letter from the Assistant Attorney General inviting submission of new evidence on the validity of the listing constituted a waiver of the ten day limitation period.

Shortly after this Petition was filed, the Attorney General denied all relief. His letter referred to the earlier assurances that new information providing a reasonable basis for delisting would be given careful consideration, but concluded: "[T]he information contained in the petition . . . which

[6]In the *Scythes* case the Seventh Circuit held that ambiguous and abstract passages in party literature do not suffice to characterize an organization as one advocating the violent overthrow of the government. The court relied on Scales v. United States, 367 U.S. 203 (1961), and Noto v. United States, 367 U.S. 290 (1961), stating that although the government's burden of proof was less in a deportation case (like that of *Scythes*) than in a prosecution under the Smith Act, there was no material difference in regard to the test for determining whether an organization advocates or teaches the violent overthrow of the government.

In *Thompson* the court did not rest its decision on the ground of the hearing or peculiar burden resting on the government in naturalization cases but rather, as appears from its reference to *Scythes*, on the ground of error in the ultimate standard used in the Department of Justice, i.e. by the naturalization examiners, and adopted by the District Court, for determining whether an organization advocated the violent overthrow of the government. One judge would have affirmed the denial of naturalization on another ground; he did not dissent from the court's ruling as to the nature of the IWW.

you forwarded . . . does not warrant review by this Department. In addition the case of *Thompson v. Immigration & Naturalization Service,* 332 F.2d 167 (1964), is not in point since it relates to a petition for naturalization by an individual. In this connection it should be pointed out that the Socialist Workers' Party remains an organization designated pursuant to Executive Order 10450, even though in a deportation proceeding *Scythes v. Webb,* 307 F.2d 905 (1962), the United States Court of Appeals for the Seventh Circuit found, under the standard before laid down, that there was no substantial evidence in the record that the Socialist Workers' Party advocates or teaches the violent and forceful overthrow of the Government of the United States."

On May 4, 1965, the IWW finally resorted to the courts. In addition to urging that the court declare the original listing void on the ground that it violated restrictions on the delegation of powers and offended constitutional guarantees of notice and hearing, it insisted that the Attorney General had waived the ten-day requirement, and—importantly—averred that the Attorney General's rejection of the February 12 petition was "arbitrary and capricious." The IWW added that it had exhausted its administrative remedies, and requested the court to order the Attorney General to grant a hearing, grant an injunction against further listing, and provide "such other and further relief as is just."

In his answer, in addition to raising the defenses of laches and failure to exhaust administrative remedies, the Attorney General denied the charge of arbitrary and capricious rejection of the petition (JA 17). In its motion for judgment on the pleadings, the IWW repeated its contention that the Attorney General's "action was arbitrary and capricious" in that he "summarily refused the petition and evidence." In his counter motion for summary judgment or dismissal, the Attorney General alleged that the decision in *Thompson* "is entirely irrelevant and immaterial to the designation of the plaintiff organization under Executive Order No. 10450." (JA 20) Once more, in opposing the Attor-

ney General's motion, the IWW averred that "specific arbitrary and capricious actions of the defendant include: Specific refusal to consider the decision . . . in *Thompson v. I.N.S.*, . . . the only proper relevant determination ever made of the character" of the IWW.

The District Court recognized that some broad constitutional issues were involved, but held there was no occasion to reach them. As the sole explanation for the denial of the IWW's prayers for relief and the grant of the Attorney General's motion for summary judgment, the court ruled that "by failing to exhaust its administrative remedy [of contesting the listing within ten days] the plaintiff has precluded itself from pursuing a judicial remedy."

We approve of the denial of relief premised on alleged infirmities in the 1953 listing of the IWW as a subversive group. In addition to the failure to exhaust administrative remedies,[7] the Attorney General raised the equitable defense of laches, which includes the two-fold elements of reasonable delay and likelihood of prejudice to the defendant. Here it was set forth in the statement of facts as to which there is no material dispute that the IWW had "no legal excuse for their delay of twelve years in seeking a judicial determination of their allegations relative to their designation under Executive Order No. [0450" and that it "is reasonable to presume that entertaining this suit would give rise to numerous similar suits by others of the nearly three hundred organizations designated under Executive Order No. 10450." It is also reasonable to assume that this delay would severely complicate the ability to adduce evidence available when the original determination was made.

The District Court accompanied its judgment with a brief, oral statement that appellant's failure to exhaust its admin-

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[7] *See* JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 450-58 (abr. ed. 1965).

istrative remedies precluded pursuit of a judicial remedy. We have approved the refusal to provide judicial relief when a listed organization deliberately by-passed administrative channels. See *National Council of American-Soviet Friendship v. Brownell,* 100 U.S.App.D.C. 116, 243 F.2d 222 (1957). We cannot say it was an abuse of discretion for the District Court to refuse to consider the IWW's challenges to its 1953 listing.

That determination, however, does not dispose of the case, and herein lies the District Court's error. To say that the IWW can no longer demand a judicial hearing on the validity of the 1953 listing is a far cry from concluding that the organization is eternally ousted from resort to the courts for other, subsequent complaints. It is settled that justiciable rights are involved here. See *Joint Anti-Fascist Refugee Comm. v. McGrath, supra.* First Amendment rights are at stake. In such a situation we think the chief law officer of the United States is under a legal duty to adhere to minimal standards of fairness and reasonableness when he acts.

Even where an organization failed to exhaust the administrative remedy provided by the regulation, this court concluded that an additional period should be provided to an organization that had made clear its non-acquiescence in the listing. *Joint Anti-Fascist Refugee Committee v. Brownell,* 94 U.S.App.D.C. 341, 215 F.2d 870 (1954).

Here we have another issue—the action on appellant's petition for delisting in the light of developments subsequent to 1953, namely the Seventh Circuit's 1964 ruling in *Thompson.* That decision is not necessarily dispositive of the complaint before us. The Attorney General asserts that it is "entirely irrelevant and immaterial" to the designation of the IWW, but this is the determination that the organization claims is arbitrary and wishes a court to examine. It argues in the alternative that the *Thompson* decision provides at least sufficient momentum to entitle it to an administrative hearing on its prayer for discontinuance of the listing.

The District Court withheld consideration on the merits of the claim that the refusal was arbitrary, but we believe the IWW was entitled to judicial consideration of that issue. This entails at least a careful analysis of the *Thompson* litigation. Ultimate resolution may come to require some consideration of the factual background for appellant's designation, for this may be decisive in determining whether it was indeed capricious to term the *Thompson* ruling "entirely irrelevant." The problem is not a simple one. It is clear enough that reasonable consideration must be given to new evidence. Apparently the Attorney General would also agree that reasonable consideration must be given to newly announced legal doctrine. Such consideration is available in a court notwithstanding an earlier decision in the same controversy put forward as the law of the case.[8] The *Thompson* decision is a third category—the appearance of a new judicial determination of the ultimate legal significance of relevant evidence, a determination that may embody both factual inferences and changing legal concepts.

We do not now intimate any view on the merits of this allegation other than to hold that it adequately raises an issue that the District Court ignored. Since 1953, when the last deliberate decision to list the IWW as a subversive group was made, there has been a considerable development in public and judicial attitudes toward control of subversives.[9]

While none of the decided cases precisely involves the issues the District Court is to consider on the remand, their approach may have some relevance in determining whether

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[8]Naples v. United States, 123 U.S.App.D.C. 292, 359 F.2d 276 (1966).

[9]*See e.g.*, Keyishian v. Board of Regents, 385 U.S. 589 (1967); Elfbrandt v. Russell, 384 U.S. 11 (1966); United States v. Brown, 381 U.S. 437 (1965); Aptheker v. Secretary of State, 378 U.S. 500 (1964); Scales v. United States, 367 U.S. 203 (1961); Noto v. United States, 367 U.S. 290 (1961); Communist Party v. SACB, 367 U.S. 1 (1961); Kent v. Dulles, 357 U.S. 116 (1958); Yates v. United States, 354 U.S. 298 (1957).

the Attorney General's conduct must be held arbitrary and capricious. We think the District Court, having judicial jurisdiction,[10] should have the first opportunity to address itself to this question, with such further amplification by the parties as the court in its sound discretion deems advisable.

The order granting summary judgment in favor of the Attorney General is affirmed insofar as it declines to review the 1953 listing. In regard to appellant's claim that the Attorney General acted arbitrarily on its 1965 petition for delisting, the order is vacated and the cause is remanded for further proceedings not inconsistent with this opinion.

So ordered.

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[10]The Attorney General challenges, *inter alia*, judicial jurisdiction, on the principle that this is in effect an unconsented-to suit against the United States. That issue was settled in the IWW's favor by *Joint Anti-Fascist*. The Attorney General argues that the IWW has pointed to no statutory provision consenting to suit against the Attorney General in his official capacity. Although we agree that general grants of judicial jurisdiction are not usually construed as consent to suit, the IWW in its complaint squarely relied on Section 10 of the Administrative Procedure Act, 5 U.S.C. §§ 701-06 (Supp. II, 1965-66), which accords a right to judicial review to "a person suffering legal wrong because of agency action" (§ 702). "Agency" is defined as "each authority of the Government of the United States," except for irrelevant exceptions (§ 701(b)(1)). In the absence of any specified form of proceeding, review may be had by "any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction" (§ 703). And Section 706 broadly directs the courts, to the extent necessary, to decide questions of law, interpret constitutional and statutory provisions, "compel agency action unlawfully withheld or unreasonably delayed," and hold unlawful and set aside agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." If consent to suit there must be consent to suit there here is.

DANAHER, *Circuit Judge, dissenting:* To the extent that my colleagues find no error in the order under review I would agree, but there I would stop. I think this case should not be remanded for any purpose.

Listed pursuant to the 1947 Executive Order No. 9835, and further listed after the 1953 Executive Order No. 10450, these appellants at neither time took the steps available to them to contest their designation. No timely challenge was levied against the orders or the regulations issued pursuant thereto. No administrative relief was sought. No judicial relief was asked. My colleagues acknowledge, as they must, that the District Court did not abuse its discretion in rejecting the appellants' present attack upon designation following Executive Order 10450, *National Council of American-Soviet F. v. Brownell*, 100 U.S. App. D.C. 116, 243 F.2d 222 (1957).

But, some twelve years having elapsed since the designation, my colleagues say they can now discern that a justiciable controversy has emerged. Although no allegations had been submitted to the Attorney General to suggest a "material change in the character of the organization," and there had been no showing of "newly discovered material evidence," or why it is only now "newly discovered," my colleagues would cause this case to be reopened. Neither in their correspondence nor in the record had the appellants proffered compliance with the basis upon which the Attorney General said he would be moved to act.

Let them, even now, not on their own terms but on his, meet the conditions upon which the Attorney General said *he* would entertain reconsideration. This is no case for this court's intervention on the record now before us.

I dissent.[1]

[1] And insofar as the majority seems to find that Thompson v. Immigration & Naturalization Service, 322 F.2d 167 (7th Cir. 1964) has somehow infused new life into the defunct claim here resurrected, I suggest a mere reading of the opinion will demonstrate that a completely distinguishable issue was there presented. I agree with the Attorney General's conclusion that what was there decided in 1964 was "entirely irrelevant" to the designation of the appellant organization in 1953.